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<b>V.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-1300</b>
	)	<b>Issued: April 25, 2022</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp;</b>	)	
<b>DISTRIBUTION CENTER, St. Petersburg, FL,</b>	)	
<b>Employer</b>	)	
	)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

On August 20, 2021 appellant filed a timely appeal from a February 26, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

The issue is whether appellant has met her burden of proof to establish permanent impairment of her bilateral lower extremities due to her accepted lumbar conditions.

<sup>2</sup> The Board notes that, following the February 26, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 16, 2008 appellant, then a 44-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on June 10, 2008 she lifted heavy trays and felt pain in her back and right side of her lower abdomen. She stopped work on June 12, 2008 and eventually returned to a modified position at six hours per shift.<sup>4</sup> OWCP accepted the claim for a lumbosacral sprain, abdominal wall strain, herniated disc at L4-5 and left thoracic or lumbosacral neuritis or radiculitis. Appellant retired effective October 14, 2014.

On October 11, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

Appellant provided an August 22, 2019 report from Dr. Mark A. Seldes, a Board-certified family practitioner, who noted her history of injury and reviewed diagnostic testing. Dr. Seldes' neurological examination revealed decreased sensation to light touch and impaired sharp dull discrimination over the proximal and lateral parts of the thigh, the anterior aspects of the knees and into the dorsum of the feet, left side greater than right side. Appellant also had decreased sensation to light touch and impaired sharp and dull discrimination over the posterolateral calves and the lateral aspect of the feet left side greater than right. He found a mild motor deficit in the hip abductors on the left side with strength of 4/5 and, on the right side, a strength of 4/5 and weakness in the Iliopsoas with the strength of 4/5 bilaterally. Dr. Seldes also noted reduced strength in the quadriceps flexors, extensor hallucis longus muscle, plantar flexor and deep tendon reflexes for the patellar medial hamstring and Achilles bilaterally. He diagnosed lumbar radiculopathy with bilateral lower extremity symptoms in the L3 and L4 nerve roots and lumbar degenerative disc disease, all confirmed by diagnostic testing. Based on his examination findings, Dr. Seldes opined that appellant had reached maximum medical improvement (MMI) as of August 22, 2019. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> and *The Guides Newsletter, Rating Spinal Nerve Impairment Extremity Impairment Using the Sixth Edition*, July/August, (*The Guides Newsletter*), to his findings and determined that appellant had 23 percent permanent right lower extremity impairment and 23 percent permanent left lower extremity impairment for Class 1 bilateral spinal nerve root impairments for the L3 and L4 nerve roots. He also provided his impairment calculations. Dr. Seldes found a grade modifier for functional history (GMFH) of 2, based on an AAOS lower limb questionnaire, and a grade for modifier clinical studies (GMCS) of 2, based on April 10, 2018 electromyography (EMG) and nerve conduction velocity (NCV) testing, which showed evidence of lumbar radiculopathy with bilateral L3 and L4 nerve distribution. He found a net adjustment of +2 after application of the net adjustment formula or grade E severity. For the bilateral L3 nerve root, Dr. Seldes found 4 percent bilateral severe sensory deficit and 5 percent bilateral mild motor deficit for a combined 9 percent lower extremity

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<sup>3</sup> Docket No. 11-197 (issued October 18, 2011).

<sup>4</sup> Appellant received compensation for the remaining two hours per shift.

<sup>5</sup> A.M.A., *Guides*, 6<sup>th</sup> ed. (2009).

impairment. For the bilateral L4 nerve root, he found 6 percent severe sensory deficit and 9 percent mild motor deficit for a combined 15 percent lower extremity impairment. Using the Combined Values Chart on page 604 of the A.M.A., *Guides*, Dr. Seldes combined the 9 percent impairment for the L3 nerve root with the 15 percent impairment for the L4 nerve root for 23 percent total lower extremity impairment for the left and right lower extremities.

In an October 25, 2019 development letter, OWCP requested that Dr. Seldes provide a medical report which included a diagnosis, and a detailed description of objective findings. Dr. Seldes was also advised that the report should include a finding of MMI, and a permanent impairment rating in accordance with the sixth edition of the A.M.A., *Guides*, and *The Guides Newsletter*. OWCP afforded 30 days for a response. No response was received.

On December 4, 2019 OWCP referred appellant's case, including a statement of accepted facts (SOAF), to Dr. Michael M. Katz, a Board-certified orthopedic surgeon and district medical adviser (DMA). In a December 11, 2019 report, Dr. Katz reviewed the medical record, including the magnetic resonance imaging (MRI) scans of December 15, 2017 and the August 31, 2016 study, and found that the examination findings noted by Dr. Seldes, especially those on the left lower extremity, were not supported by the anatomical findings noted by the diagnostic radiology studies. He recommended a second opinion examination to address these discrepancies. Dr. Katz noted that appellant's accepted back conditions were not eligible for an alternative range of motion (ROM) impairment calculation and that the date of MMI was undetermined at the present.

Dr. Seldes continued to provide progress reports in which he diagnosed lumbar radiculopathy with bilateral lower extremity symptoms notable in the L3 and L4 distribution and lumbar degenerative disc disease.

On January 10, 2020 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion permanent impairment evaluation.

In a February 7, 2020 report, Dr. Dinenberg described appellant's employment injury and noted his review of her ongoing symptoms and the medical record. He noted that appellant ambulated with an antalgic gait using a walker, which she indicated was secondary to low back pain and plantar fasciitis. On physical examination Dr. Dinenberg noted objective findings of give way muscle testing bilaterally, diminished ROM of the lumbar spine and intact and symmetric reflexes. He also noted that appellant had pain of the lumbar spine with gentle axial load and gentle palpations and stocking-like distribution numbness in bilateral lower extremities. Dr. Dinenberg noted the administratively accepted lumbar spine strain, and herniated nucleus pulposus of the lumbar spine at L4-5. He opined that appellant had reached MMI as of February 7, 2020. Dr. Dinenberg requested an updated EMG/NCV study of the bilateral lower extremities prior to completing an impairment rating.

On June 16, 2020 Dr. William C. Hulley, a neurologist serving as an OWCP second opinion physician, performed an EMG/NCV study. He opined that there was no evidence of left or right lumbosacral motor radiculopathy or generalized peripheral neuropathy. Dr. Hulley noted that the studies were slightly sub-optimal due to the large amount of edema involving both ankles and feet, which made recordings difficult, and that appellant had restrictions in total movement due to the edema.

In a June 21, 2020 addendum, Dr. Dinenberg opined that the June 16, 2020 studies by Dr. Hulley revealed a probably normal examination with no evidence of left or right lumbosacral motor radiculopathy or generalized peripheral neuropathy. Based on appellant's February 7, 2020 non-physiologic examination findings, which had no evidence of radiculopathy and a negative straight leg raise, and the June 16, 2020 EMG and NCV studies, which also revealed no evidence of radiculopathy, he opined that appellant did not have a permanent impairment of the bilateral lower extremities under *The Guides Newsletter*.

OWCP again referred Dr. Dinenberg's report and the evidence of record to Dr. Katz serving as a DMA. In a July 10, 2020 report, Dr. Katz reviewed Dr. Dinenberg's reports and noted that Dr. Dinenberg found no physiologic myotomal motor or dermatomal sensory deficits in either lower extremity and that he had documented multiple Waddell signs, which were indicative of non-organic spine pain. Under proposed Table 2, Spinal Nerve Impairment; Lower Extremity Impairment, the DMA found for spinal nerves L3, L4, L5, and S1 of both lower extremities that there was no motor deficit and no sensory deficit with no net adjustment. Thus, he opined that each extremity had class 0 or 0 percent impairment. The DMA further opined that the A.M.A., *Guides* did not allow for an alternative ROM impairment calculation for the accepted conditions.

By decision dated July 21, 2020, OWCP denied appellant's schedule award claim, finding that she had not met her burden of proof to establish permanent impairment of a scheduled member or function of the body. The weight of the medical evidence was accorded to the DMA.

On November 23, 2020 appellant requested reconsideration. In an August 31, 2020 NCV/EMG study report, Dr. Robert Guirguis, a Board-certified pain management specialist, found electrodiagnostic evidence consistent with lumbar radiculopathy affecting the bilateral S1 nerve roots.

On October 5, 2020 Dr. Seldes indicated his review of the report.

On February 8, 2021 OWCP requested that Dr. Katz, its DMA, review the updated September 18, 2020 SOAF and the August 31, 2020 EMG/NCV study and provide a supplemental report.

In a February 19, 2021 report, Dr. Katz re-reviewed the medical evidence and indicated that it remained his opinion that Dr. Dinenberg's findings were more accurate. He noted that Dr. Hulley, a Board-certified neurologist, performed electrodiagnostics on June 16, 2020 and found no evidence of left or right lumbosacral motor radiculopathy or generalized peripheral neuropathy. Dr. Seldes, however, determined significant sensory and motor deficits bilaterally at the L3 and L4 levels, which show no abnormality per the electrodiagnostic findings of either examiner. Dr. Katz indicated that, under *The Guides Newsletter*'s instructions, the assessment of a spinal nerve deficit was based on the clinical examination, and electrodiagnostics were only a clinical modifier to adjust the clinical examination findings. For that reason, he opined that the weight of the medical evidence favored the opinion of Dr. Dinenberg as a Board-certified orthopedic surgeon over that of Dr. Seldes, a family physician, as Dr. Dinenberg's training and experience would generally place him as an expert in assessing dermatomal and myotomal deficits. Additionally, Dr. Dinenberg's opinion was supported and confirmed by the electrodiagnostic findings of a Board-certified neurologist. Thus, he opined that appellant had no impairment of either lower extremity.

By decision dated February 26, 2021, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice, under the law for all claimants, OWCP has adopted the A.M.A., *Guides*, as the uniform standard applicable to all claimants.<sup>8</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, is used to calculate schedule awards.<sup>9</sup>

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,<sup>10</sup> or the body as a whole. However, a schedule award is permissible where the employment-related spinal conditions affects the upper and/or lower extremities.<sup>11</sup> The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.<sup>12</sup>

Section 8123(a) of FECA provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>13</sup>

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<sup>6</sup> *Supra* note 1.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a. (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>9</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>10</sup> FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

<sup>11</sup> *Supra* note 8 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

<sup>12</sup> *Supra* note 8 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>13</sup> 5 U.S.C. § 8123(a).

## ANALYSIS

The Board finds that this case is not in posture for decision.

In his August 22, 2019 report, Dr. Seldes reported appellant's neurological examination revealed decreased sensation to light touch and impaired sharp dull discrimination over the proximal and lateral parts of the thigh, the anterior aspects of the knees and into the dorsum of the feet, left side greater than right side. Appellant also had decreased sensation to light touch and impaired sharp and dull discrimination over the posterolateral calves and the lateral aspect of the feet left side greater than right. Dr. Seldes found a mild motor deficit in the hip abductors on the left side with strength of 4/5 and, on the right side, a strength of 4/5 and weakness in the Iliopsoas with the strength of 4/5 bilaterally. He also noted reduced strength in the quadriceps flexors, extensor hallucis longus muscle, plantar flexor and deep tendon reflexes for the patellar medial hamstring and Achilles bilaterally. Dr. Seldes based his impairment rating of 23 percent permanent impairment on these positive findings and on objective testing.

In contrast, Dr. Dinenberg reported that appellant had non-physiologic examination findings, with no evidence of radiculopathy on examination including a negative straight leg raise, and the June 16, 2020 EMG/NCV was probably normal and which also revealed no evidence of radiculopathy. He opined that appellant had no impairment for the bilateral lower extremities under *The Guides Newsletter*. Dr. Katz found that the examination findings noted by Dr. Seldes, especially those on the left lower extremity, were not supported by the anatomical findings noted by the diagnostic radiology studies. He further indicated that, under *The Guides Newsletter's* instructions, the assessment of a spinal nerve deficit was based on the clinical examination, and electrodiagnostics were only a clinical modifier to adjust the clinical examination findings. Dr. Katz opined that appellant had no impairment of either lower extremity.

The Board, therefore, finds that a conflict exists in the medical opinion evidence between Dr. Seldes and Drs. Dinenberg and Katz as to whether appellant has sensory or motor deficits of the bilateral lower extremities due to peripheral nerve impairment arising from appellant's accepted lumbar conditions.<sup>14</sup>

Consequently, the case must be referred to an impartial medical specialist to resolve the existing conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a) regarding appellant's bilateral lower extremity permanent impairment, if any. On remand OWCP shall refer appellant, along with the case file and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical evaluation for a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's schedule award claim.

## CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>14</sup> *Id.*; see *L.P.*, Docket No. 21-0409 (issued November 5, 2021).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 26, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 25, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board